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April 18, 2007

Justices of the Supreme Court of Arizona
State of Arizona
1501 W. Washington
Phoenix, Az. 85007

Re: Comment to Proposed Amendment to ARCP 75(a)

Dear Justices:

My comments herein are meant to address the proposed amendment to the above referenced Rule, wherein placing a case in compulsory arbitration will effectively result in the plaintiff/injury victim waiving all medical privilege/privacy rights concerning medical records and information by requiring injury victims to provide counsel defending against their claims with medical information releases to obtain essentially all the injury victim's medical records. While I understand the goal of this amendment is to streamline and expedite the arbitration process, unintended consequences damaging to the injury victim will be the result.

By way of examples, Mrs. Smith fractures her wrist in a fall at a supermarket. She has a teenage daughter or son who has behavioral problems for which she, herself, has sought psychiatric or psychological counseling to help her cope. Because she files a lawsuit for damages associated with her wrist fracture, she must then make public and provide the defense access to her psychological/psychiatric history? Mr. Jones has erectile dysfunction and has medical assistance in that regard. He suffers a back injury in a motor vehicle accident. He must now allow the defense to explore at its discretion his sexual problems?

These same kind of concerns in lesser and even greater degrees permeate a process in which a blanket automatic rule of requiring disgorgement of such private and privilege information is required by rule of law. In addition, the amendment proposed runs squarely contrary to Arizona's medical privilege statute and decisional law. *See Bain v. Superior Court, Duquette v. Superior Court.*

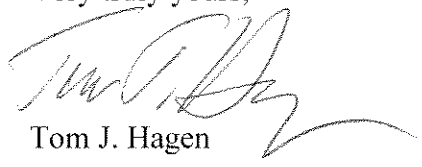
While perhaps a majority of the defense bar involved in defending injury claims would exercise an expected amount of decorum, good sense and integrity with regard to delicate private and privileged medical matters, such traits are not universally shared throughout the profession, nor in any profession. What happens when an injury victim's private medical record refers to an extramarital affair about which his/her spouse is unaware? Does that get bandied about and made public by defense counsel? Does such an injury victim simply drop their claim, deciding that having no choice but to provide defense counsel access to any/all his medical history, however

unrelated and immaterial they may be to the injury claim at hand, is a worse evil than going uncompensated for an injury and damages caused by a tortfeasor?

In short, I believe there are better and less intrusive means by which to accomplish the stated goal. For example, a Rule requiring the plaintiff to obtain all his/her available medical records for a period of 5 years preceding the injurious event in issue and either providing those records to the defense in disclosure or alternatively identifying such records in a privilege log stating the basis for the claim of privilege, *see Rule 26.1 (f)**would seem to not only streamline the process, but also serve both parties' desire and obligation to fully explore facts, not privileged, material to the litigation.

Thank you for any consideration you may give these comments.

Very truly yours,



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* Oddly, Rule 26.1(f) is seldom followed by practitioners, who predominantly simply interpose objections [i.e. "privilege", "work product"] and fail to identify with any particularity whatsoever what IT is that they claim falls under the privilege. Likewise, trial judges have not been particularly uniform in insisting this Rule be followed. As pertains to the proposed Amendment, plaintiff's lawyers vary widely in their diligence in obtaining medical records that may [or may not] be subject to disclosure. A requirement to "obtain and disclose" records for a reasonable time period, or alternatively assert privilege and identify the records not disclosed on that basis might bring some uniformity to the process as well.